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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-200256

DATE: May 20, 1981

MATTER OF: Duane E. Messmer - Discontinued Service Retirement, Retroactive Application of

DIGEST: Retirement may be retroactively effected where agency incorrectly advised employee whose position was abolished that he had to meet age and service requirements as of March 31, 1979, rather than September 30, 1979, to qualify for discontinued service retirement. Agency may retroactively change employee's record to show that he was retired on May 6, 1979. The failure of agency to notify employee that he had an additional 6 months within which to qualify constituted administrative error which deprived him of right granted by statute and regulation to elect discontinued service retirement.

The Internal Revenue Service (IRS) requests our decision on whether an employee may be retroactively granted discontinued service retirement where the IRS did not advise the employee of the extension of a reorganization period which would have allowed him to continue on transitional detail until he was eligible for discontinued service retirement. The failure of the IRS to notify the employee of the extension constituted administrative error which justifies retroactive relief.

In 1978 IRS revised its appeals procedures and reorganized to implement the new one-level-of-appeal process. The reorganization which involved, among other changes, abolishment of a number of positions, was scheduled to take place over a period of several months and affected offices were instructed to accomplish the reorganization within that period. Employees whose positions were being abolished and who were eligible in terms of age and years of service for discontinued service retirement were advised of that option.

One of the affected employees, Mr. Duane E. Messmer, was notified that his job was being abolished and that he was being detailed to a transitional position pending more permanent arrangements. His detail was to expire on March 31, 1979. He expressed an interest in retiring and inquired about his eligibility for discontinued

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service retirement. Based on a memorandum advising personnel offices to determine interested employees' eligibility as of March 31, 1979, he was advised that he would not meet the age and service requirements before March 31. He was offered reassignment to the position of Appellate Conferee. Because he had been advised that he was ineligible for discontinued service retirement he accepted the position offered and was reassigned effective March 11, 1979.

Incident to the reorganization the Office of Personnel Management (OPM) had in fact approved IRS' authority to effect discontinued service retirement through the period ending September 30, 1979. This information was not conveyed to the District Personnel Office until after September 30, 1979. Mr. Messmer would have met the age and service requirements for discontinued service retirement on May 6, 1979, and would have been eligible at that time to file for discontinued service retirement if he had still been on transitional detail.

Mr. Messmer has filed a grievance concerning the IRS' failure to advise him of the additional period within which to qualify for discontinued service retirement and, as a remedy, seeks to elect to retire at this time. He states that the period of his transitional detail was in fact extended to June 30, 1979. Though we have not been furnished documentation extending Mr. Messmer's detail beyond March 31, 1979, the record does indicate that IRS had authority to use transitional details for periods of up to 1 year, not to exceed October 1, 1979.

The IRS requested advice from the Office of Personnel Management as to the request of Mr. Messmer. It was suggested by OPM that IRS request the Comptroller General to authorize retroactive separation. If the Comptroller General authorized retroactive separation, OPM would treat the employee as having retired on May 6, 1979, and as having served as a reemployed annuitant thereafter.

For purposes of this decision we assume as reported to us that Mr. Messmer meets all the statutory and regulatory conditions to be eligible for the

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discontinued service retirement. Thus, the only issue we will address is whether IRS may retroactively amend its records to show that Mr. Messmer was separated May 6, 1979.

Discontinued service retirement is authorized by 5 U.S.C. § 8336(d) (1976), which provides in pertinent part:

"An employee who is separated from the service--

"(1) involuntarily, except by removal for cause on charges of misconduct or delinquency; or

* * * * *

after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to an annuity."

Federal Personnel Manual Supplement (FPM Supp.) 831-1, para. S11-2a, defines "involuntary separation" as including abolishment of position. Paragraph S11-2c states in part:

"If an employee, after receiving notice he will be separated under any of the circumstances cited in paragraph a above, resigns before the scheduled separation date, his separation is involuntary. * * *"

Thus, it can be seen that the regulations clearly contemplate that proper notice be given to an employee in the event of an action which would cause his involuntary separation so that he could make a timely election with respect to discontinued service retirement.

We have made exceptions to the general rule against retroactive personnel actions "* * * where administrative or clerical error (1) prevented a personnel action from being effected as originally intended,

(2) resulted in nondiscretionary administrative regulations or policies not being carried out, or (3) has deprived the employee of a right granted by statute or regulation." Douglas C. Butler, B-192295, November 1, 1978, 58 Comp. Gen. 51, 53 (1978). See also 55 Comp. Gen. 42 (1975); 54 Comp. Gen. 888 (1975).

We have authorized an employee's discontinued service retirement to be effected retroactively when administrative error in failing to properly process an employee's case deprived him of his right to elect discontinued service retirement. Our holding in Dale Ziegler and Joseph Rebo, B-199774, November 12, 1980, involved two employees who received reduction-in-force notices who were incorrectly advised by their agency that the circumstance of the reduction in force did not qualify them for discontinued service retirement. Based on that advice the employees accepted offers of other positions. Upon OPM's determination that another employee was eligible for discontinued service retirement under identical circumstances, the agency requested authority to retire the employees for involuntary separation even though they had accepted new positions. In that case, we held that the agency's failure to comply with regulations requiring the agency to obtain an advance decision from OPM when doubt exists concerning whether a separation is "involuntary" for retirement purposes, deprived the employees of the right granted them by statute and regulation to elect discontinued service retirements. To the same effect, see Conrad A. Gerard, B-200796, February 16, 1981.

In Mr. Messmer's case, employees affected by the reorganization were authorized to be detailed for periods of up to 1 year and, if qualified, to elect discontinued service retirement through the period ending September 30, 1979. The record establishes that if Mr. Messmer had received proper notice of the extended period within which to elect discontinued service retirement, his retirement would have been effected. The instructions conveyed to the District Office indicating that affected employees would have to meet the discontinued service retirement eligibility requirements as of March 31, 1979, had the effect of depriving Mr. Messmer of his option to elect discontinued service retirement.

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Accordingly, Mr. Messmer is entitled to be separated retroactively as of May 6, 1979, in order to receive discontinued service retirement.

Milton J. Aorlan

Acting Comptroller General
of the United States